

2011 WL 7400822 (Ind.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Indiana.
Lake County

The Estate of John MURAWSKI, by Personal Representative Charlotte Roach, Plaintiff,

v.

THE COMMUNITY HOSPITAL, et al., Defendants;

The Estate of John Murawski, by Personal Representative Charlotte Roach, Petitioner,

v.

Stephen W. Robertson, in his Capacity as Commissioner of the Indiana Department of Insurance; The Community Hospital; The Community Hospital Auxiliary of Munster Ind Inc d/b/a The Community Hospital; Munster Medical Research Foundation Inc. d/b/a The Community Hospital; and Proassurance Companies, Respondent.

No. 45D04-0901-CT-00028.
March 18, 2011.

Respondent's Reply Brief in Support of Partial Summary Judgment

Hinshaw & Culbertson LLP, [Scott B. Cockrum](#) 20840-45, [Kate Van Bokkelen](#) 26626-45, Counsel for Commissioner, Indiana, Department of Insurance, 322 Indianapolis Blvd., Suite 201, Schererville, in 46375, 219-864-5051.

NOW COMES the Respondent, Stephen W. Robertson, in his capacity as Commissioner, Indiana Department of Insurance, by and through counsel, Hinshaw & Culbertson LLP, and for his reply brief in support of partial summary judgment, Respondent states the following:

I. INTRODUCTION

A “dependent next of kin” must show more than mere receipt of sporadic donations and payments for lodging. Indiana law requires much more when determining dependency, it requires a *need or a necessitous want* for support on the part of Charlotte Roach coupled with actual contributions to such support by Murawski. The undisputed facts show that Ms. Roach never had a need or a necessitous want for support from Murawski and that Murawski never contributed any significant continuous support. At the time of Murawski's death, Ms. Roach was a **financially**, self-sufficient, retired sixty-one (61) year old married woman. She resided with her husband and Murawski. Both she and her husband received funds from retirement accounts, pensions, and monthly social security checks. Ms. Roach worked for a bank for about 27 years before retiring in 2001. Her husband also retired in 2001.

In support of her opposition brief, Petitioner presented inadmissible hearsay evidence and a contradictory affidavit in an attempt to manufacture an issue of fact. Even if such evidence is considered by the Court, she is still unable to present any competent evidence that supports a reasonable conclusion that Ms. Roach was her ninety-eight (98) year old father's dependent under Indiana law. Furthermore, instead of explaining how she was **financially** dependent upon Murawski or how she had an actual need for support, Ms. Roach merely scatters conclusory statements of fact without any support or reasoning for such statements.

II. ARGUMENT

A. Petitioner has failed to show an actual “need for support” from Murawski.

Contrary to Petitioner reliance that this case hinges on an in-depth analysis of alleged disputed facts, the key to this case is simply applying the clear and unequivocal definition of dependency to the undisputed facts. As our Supreme Court has held, to establish dependency under the General Wrongful Death Act, “[s]ervices must go beyond merely helping other family members, even those who had relied on the assistance The support must also be more than just a service or benefit to which the claimed dependent [Ms. Roach] had become accustomed.” *Estate of Sears v. Griffin*, 771 N.E.2d 1136, 1139 (Ind. 2002). Ms. Roach has to show an actual dependence on Murawski and that she had an actual “need for support” from Murawski. *Necessary v. Inter-State Towing*, 697 N.E.2d 73, 78 (Ind. Ct. App. 1998). “Payments of board, lodging, or other accommodations, mere gifts, or acts of generosity are insufficient to establish dependency.” *Koger v. Reid*, 417 N.E.2d 1142, 1144 (Ind. Ct. App. 1981), quoting *New York Central Railroad Company v. Johnson*, 127 N.E.2d 603 (1955); *Necessary*, 697 N.E.2d at 77.

The cases where an adult relative has been found to be “dependent” on the deceased involved circumstances very different from those alleged in this case. For example, Petitioner relies heavily on *Necessary v. Inter-State Towing*, 697 N.E.2d 73 (Ind. Ct. App. 1998), in support of Ms. Roach's contentions that she was mutually dependent or that she was partially dependent on Murawski, rather than her initial contention that she was completely financially dependent. In *Necessary*, the court found an issue of fact regarding whether an adult son and grandson were partially dependent on their deceased mother because his mother “made significant, regular and continuous financial and non-financial contributions on a daily basis.” *Id.* at 78. (emphasis provided). In particular, the evidence revealed that the mother was responsible for paying the utility bill (\$311.00) each month and bought the groceries (\$250.00), cooked all the food and cleaned the house while the family resided together. Therefore, partial or mutual dependence may be found only if there are significant financial contributions and are made on a daily basis.

In the *City of Indianapolis v. Taylor*, 707 N.E.2d 1047 (Ind. Ct. App. 1999), the court found the mother was partially dependent upon her deceased son because he “made regular monetary contributions to his mother,” as well as “helped around the house, cleaned the house, cut grass, shoveled snow, and washed cars,” all of which “helped Mother attend nursing school while she held down a full time job and a part time job.” *Id.* at 1061. In particular, the Court noted that the mother in *Taylor* was a divorced custodial parent of three children. *Id.*

It is important to note that in both *Necessary* and *Taylor*, the Court was required to first find a showing of an “actual need for support.” Even in those cases where the dependent was found to be partially or mutually dependent, the Court first determined that an “actual need” existed. *Necessary*, 697 N.E.2d at 76. (holding that in order to prove dependency, it must be shown that “a need or necessity of support [existed] on the part of the person alleged to be dependent ... coupled with the contribution to such support by the deceased; *Taylor*, 707 N.E.2d at 1061 (holding that dependency must be actual, amounting to a necessitous want on the part of the beneficiary). Only after the first prong of the dependency test is satisfied, can a determination be made as to whether the decedent actually regularly contributed to that need.

Furthermore, both *Taylor* and *Necessary* were decided prior to the Indiana Supreme Court decision in *Estate of Sears v. Griffin*, 771 N.E.2d 1136 (Ind. 2002), which confirms and sets forth the test for dependency, partial or mutual. *Estate of Sears* holds that in order for a person to claim dependent, the individual must “show a need or necessity for support ... coupled with the contribution to such support by the deceased.” *Id.* at 1139. The Court continued to explain that support must also be more than just a service or benefit to which the claimed dependent had become accustomed, and that the services provided must go beyond merely helping other family members, even those who have relied on that assistance. *Id.*

Here, the admissible evidence undoubtedly shows that Ms. Roach never had an “actual need” for support from her father, and for purposes of this motion, Respondent is not disputing any of the evidence submitted by Petitioner; therefore, there is no question of fact and this case can be decided as matter of law on summary judgment¹. To be sure, Respondent's statement of facts only cites to Petitioner's deposition testimony and her bank records, both of which cannot be disputed by Petitioner.

Petitioner's Response attaches her affidavit and additional **financial** records which merely repeat the deposition testimony and adds inadmissible facts, none of which show Petitioner's "need for support."²

Thus, unlike the mother in *Necessary* and the son in *Taylor*, the admissible and undisputed evidence submitted by both sides fails to show any dependency by Ms. Roach, partial or mutual. Rather the evidence shows that Murawski was dependent on Ms. Roach and not vice versa. There is no doubt that Murawski would not have had the quality and longevity of the life he did without Ms. Roach's twenty-four (24) hour assistance. The undisputed facts show that Ms. Roach retired in 2001 after 27 years of working for a bank, therefore, she did not need any of the services or **financial** contributions to assist her with attending school while working several jobs like the mother in *Taylor*. Also, there is no evidence that Murawski regularly or monthly paid the utility bill, or any bill, like the mother in *Necessary*.

Instead of addressing the undisputed facts, Petitioner attempts avoid the effect of the undisputed material facts by inundating this Court with an inordinate amount of inadmissible and irrelevant testimony and documents. She bases her alleged need for support on statements that she had to withdraw money from her and her husband's retirement accounts after they both retired; such statements are a red herring at best since the entire purpose of having IRA accounts is to use money for retirement. Furthermore, her bank account statements show that she was never in a position where she could not pay a bill, pay off a loan, or buy a car. As such, once the admissible and relevant evidence is deciphered, there is no factual dispute as to whether she needed **financial** support from her father, and because there is no jury deciding this case, there is no reason to delay the determination that damages are governed by the Adult Wrongful Death Statute, [Ind. Code § 34-23-1-2](#).

Murawski was an **elderly** man, living to be 98 years old he resided with Ms. Roach for the sole reason that she is able to take care of him and keep an eye on him. (Respondent's Exhibit 1, Deposition of Charlotte Roach, p. 37, Ins. 19-25; p. 38, Ins. 1-3). Petitioner's evidence, her affidavit and deposition testimony reveal that he was unable to do most of the services without Ms. Roach's assistance or observation. As such, these services are nothing more than acts of generosity for allowing him to reside in her home, or even actions that she had her 98 year old father do to keep him busy. Ms. Roach's affidavit reveals that she helped him prepare meals, she drove him around, she attended most doctor's visits with him, she drove him to church, she wrote his checks and paid his bills for him out of his account, she would stay in his bedroom while he got ready each day to listen in case he needed help, and that she was his primary caregiver since 1992. (Affidavit of Charlotte Roach, ¶¶ 9 (A-G)).

Ms. Roach's claims that Murawski paid rent, bought groceries, and helped pay taxes *a couple of times*, even if true, do not amount to a **financial** need on the part of Ms. Roach. Especially since payments of rent are insufficient for determining dependency. *see Koger v. Reid*, 417 N.E.2d 1142, 1144 (Ind. Ct. App. 1981), *quoting New York Central Railroad Company v. Johnson*, 127 N.E.2d 603 (1955); *Necessary*, 697 N.E.2d at 77. Ms. Roach never testified or argued that she "needed" the support and that he continuously provided it on a daily basis. Rather the testimony of Ms. Roach was that Murawski paid for these things because he refused to live with her for free and that he wanted certain food purchased. Ms. Roach never had an "actual need for support" or was ever in a position where she had a "necessitous want" for support from Murawski, and therefore, the cases cited in support of Petitioner's opposition brief are factually inapposite to this case.

B. Petitioner cannot refute that Murawski gave nothing more than occasional donations or gifts for the caretaking that he received from Ms. Roach.

Petitioner presented nothing in their opposition brief to demonstrate that Murawski's alleged support was continuous or significant. Rather, Petitioner attaches her own cumulative, inconsistent, and conclusory affidavit along with an inordinate amount of bank records, tax documents and check registers that are considered inadmissible hearsay, as set forth in Respondent's Motion to Strike, filed simultaneously with this Reply brief, and incorporated by reference herein. Even if the Court considers this inadmissible evidence, these records further solidify Respondent's argument that even if money was contributed by Murawski, any money that was given was done on an irregular basis.

As repeatedly set forth, pecuniary loss is the foundation of a wrongful death action, and that this loss can be determined in part by considering the assistance the decedent would have provided through money, services, or other material benefits. *Luider v. Skaggs*, 693 N.E.2d 593, 596-97 (Ind. Ct. App. 1998). However, the decedent's services or benefits must have gone beyond "merely helping" a family member, even if that person had relied on or become accustomed to such assistance. *Estate of Sears v. Griffin*, 771 N.E.2d 1136, 1139 (Ind.2002); see also *New York Central R.R. Co. v. Johnson*, 127 N.E.2d 603, 607 (Ind. 1955), cited in *City of Indianapolis v. Taylor*, 707 N.E.2d 1047, 1060 (Ind. Ct. App. 1999) ("Payments for board, lodging or other accommodations, mere gifts, donations or acts of generosity ... standing alone are not sufficient to establish dependency on the part of the recipient."). "The mere fact that the deceased occasionally contributed to the support of the beneficiary in some irregular way is not sufficient to support the action." *Kirkpatrick v. Bowyer*, 169 N.E.2d 409, 412 (Ind. Ct. App. 1960).

In *Chamberlain v. Parks*, 692 N.E.2d 1380, 1383 -1384 (Ind. Ct. App. 1998), a twenty-five-year-old helped his retired mother in and out of chairs, and would help around the house. He would run the sweeper, wash dishes, clean his bed room, mop floors, take the groceries out of the car and into the house, wash the car, iron his clothes, take the laundry upstairs from the basement, wash windows and cooked occasionally. The son painted the bathroom, helped his dad with the yard work, cut grass, raked up grass and trash, worked on the vehicles with his father and ran errands his parents, and performed other household tasks. The Indiana Court of Appeals found that those services were not sufficiently "tangible and material" to establish the parents' dependence. *Id.* Rather, the services "amounted to no more than gifts, donations and acts of generosity expected of a son to whom free housing, most of his board, gasoline money and automobile insurance was provided." *Id.*

Like the contributions of the decedent in *Chamberlain*, Murawski's services and financial donations to his daughter might have had independent pecuniary value; however, they were not substantial, continuous, and were no more than payments for lodging, gifts, donations, and acts of generosity expected of an elderly father taken in exchange for the services, care and support Ms. Roach gave Murawski for over 20 years and is insufficient for dependency. Doing his own laundry and cleaning his own room benefited Murawski, not Ms. Roach. Petitioner's evidence even reveals that there was not many activities that Murawski could do without Ms. Roach's assistance or observation. There simply is no admissible, credible evidence to support Petitioner's conclusory statements that she regularly, continuously received substantial financial support from her father, and relied on such support.

C. Indiana law is clear that non-financial contributions, such as love, care affection, or services, are insufficient to determine dependency.

Petitioner's contention that financial contributions are not required to establish dependency is incorrect and has not been held by any Indiana Court. Dependency (mutual or partial) can not be established through love, care, affection and services only and no Indiana Court has held so. *Deaconess Hosp., Inc. v. Gruber*, 791 N.E.2d 841, 847 -848 (Ind. Ct. App. 2003); *Terry v. Stephens*, 921 N.E.2d 516, 521 (Ind. Ct. App. 2010). In particular, *Deaconess Hospital*, specifically disagreed with *Necessary v. Inter-State Towing* holding that, in dicta, the court [the *Necessary* Court] stated that "[d]ependency can also be established through love, affection, and services, rather than just financial contribution." However, the court went on to hold genuine issues of material fact existed as to whether the decedent made a financial contribution to her son and grandson. Thus, the issue of whether dependency can be established through love, care, and affection was not addressed. Moreover, to the extent that *Necessary* holds that love, affection, or care may establish dependency, we disagree.

Deaconess Hosp., Inc., 791 N.E.2d at 847-848. (emphasis provided). Indeed, the Patient's Compensation Fund is not taking the position that Petitioner should not be compensated for the loss of affection, love, care, guidance, services and companionship from her 98-year-old father. Recovery of damages resulting from Murawski's alleged wrongful death are governed by the Adult Wrongful Death Statute ("AWDS"), which provides for recovery of the following damages: reasonable medical/hospital and funeral/burial. Ind. Code § 34-23-1-2(c)(3)(A). The Adult Wrongful Death Act also provides for damages for the loss of the adult person's love and companionship. (Ind. Code 34-23-1-2(c)(3)(B)), and Petitioner's claim is nothing novel; the damages

claimed are clearly contemplated by the AWDS. As such, those losses are accounted for under the AWDS, and particularly, in the \$300,000.00 additional damages available for such emotional losses.

III. CONCLUSION

For these reasons and those set forth in its Motion and Memorandum in Support, Respondent respectfully requests that this Court determine that any recovery by Petitioner is governed by the Adult Wrongful Death Act, [Ind. Code § 34-23-1-2](#) and grant partial summary judgment in Respondent's favor and against Petitioner.

Respectfully submitted,

HINSHAW & CULBERTSON LLP

By: <<signature>>

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Footnotes

- 1 Certain testimony by Roach is not supported by the documented evidence, but for purposes of this Motion, Respondent is not disputed the facts.
- 2 For example, if the inadmissible evidence is considered, page 77 to Petitioner's Exhibit 6 reveals that Ms. Roach was able to spend \$19,419.75 on the purchase of a car, and page 80 to Petitioner's Exhibit 6 reveals that Ms. Roach paid off a loan in one lump sum of \$67,026.40.

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